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SUPREME COURT, U.S.

No. 82 5089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

EVERETT T. JONES,
Appellant

v.

FREDERICKSBURG DEPARTMENT OF PUBLIC WELFARE AND SOCIAL SERVICES,
Appellee

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

JURISDICTIONAL STATEMENT

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Petitioner, Everett T. Jones, prays this Court to note probable jurisdiction for appeal to review the judgment of the Supreme Court of Virginia, which judgment found no reversible error in the judgment of the Circuit Court of the City of Fredericksburg in this case.

QUESTIONS PRESENTED

Is a state child custody statute applied unconstitutionally when it results in denying legal standing under that statute to a man who has raised a seven-year-old child from early infancy, while allowing a local welfare department to proceed on a custody petition alleging only that the child's custody is in need of determination?

Is such a statute applied unconstitutionally when it results in finding parents unfit on the basis of their economic and health conditions without any showing that such conditions have a harmful effect on the child whose custody is at issue?

OPINIONS BELOW

There is no reported opinion below. The denial of Everett Jones's petition for appeal by the Supreme Court of Virginia and the opinion of the Circuit Court of the City of Fredericksburg are set forth in the appendix to this petition.

JURISDICTION

This is an appeal from the judgment of the Supreme Court of Virginia that there was no reversible error by the Circuit Court of the City of Fredericksburg in an appeal from the ruling of the Juvenile and Domestic Relations District Court for the City of Fredericksburg on a petition to determine legal custody of the child Russell Knorr. The original petitioner below was the Fredericksburg Department of Public Welfare and Social Services.

The judgment of the Supreme Court of Virginia was entered on April 20, 1982. This petition is filed within ninety (90) days of that judgment. A notice of appeal was filed in the Supreme Court of Virginia on July 13, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(2).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The relevant sections of the Virginia Code are found at 16.1-226 et seq. (Chapter 11, Juvenile and Domestic Relations District Court). Articles 1, 3, 4, 8 and 9 are reproduced in full in the appendix to this appeal. The most relevant sections of the statutes are as follows: 16.1-227; 16.1-228.A; 16.1-241.A; 16.1-241.F; 16.1-279.A; 16.1-279.F; 16.1-281; 16.1-282; 16.1-283.

STATEMENT OF THE CASE

Lower Court Proceedings.

This is an appeal from a decision of the Circuit Court of the City of Fredericksburg, Virginia granting custody of a seven-year-old boy, Russell Knorr, to the Department of Public Welfare and Social Services of the City of Fredericksburg (the welfare department). That decision denied custody and standing under that statute to Everett Jones, who had raised Russell Knorr from infancy. The child's natural mother had consented to Everett

Jones's adopting the child in December, 1977 and appointed Mr. Jones guardian in July, 1978. Mr. Jones had not adopted the child, nor had he obtained a custody order from any court.

The welfare department removed Russell Knorr from the custody of Everett Jones and his companion, Blanche Lowman, first on September 26, 1980, under an emergency removal order from the Juvenile and Domestic Relations Court of the City of Fredericksburg. That order was entered after an ex parte hearing pursuant to a petition of the welfare department alleging that the "child's custody is in need of determination." On September 29, 1980, after a hearing in which both parties were represented, Judge William J. Cox of the Juvenile and Domestic Relations Court ordered the child returned to Mr. Jones and Ms. Lowman. Judge Cox also ordered further investigation and a subsequent hearing. At the later hearing, on November 13, 1980, the Juvenile and Domestic Relations Court again ordered the child removed, with permanent custody to the welfare department. Everett Jones filed a timely appeal to the Circuit Court of the City of Fredericksburg.

On December 18, 1980, the Circuit Court heard evidence on a motion for preliminary removal order filed by Mr. Jones, seeking return of the child to his home pending final hearing. The Circuit Court ordered that the child, who had been placed in foster care, be allowed to visit in the Jones-Lowman home for one week only, beginning Christmas day and ending January 2, 1981.

The Circuit Court subsequently held a final hearing in March, 1981, and permitted both parties to file post-hearing memoranda. Mr.Jones's memorandum expressly raised the issue of the constitutional right to family integrity and what kinds of concerns were and were not a legitimate basis for removal of a child. (See appendix, p.A-38). Judge John Jamison, by memorandum opinion, granted the petition of the welfare department, holding, inter alia, that:

". . . only the best interest of the child can be considered. I cannot agree that Jones and Lowman have the necessary standing to adopt. The child was placed with them by the natural mother and undoubtedly were she a party to this suit and were she to testify, she would favor Jones and Lowman as custodians, if for no other reason than the care and love that they gave Russell in his early years and for the favor of relieving her of that responsibility . . .

. . . I can find no realistic basis for granting permanent custody of this child to Mr. Jones and Ms. Lowman nor to Mr. Jones alone. I am reluctant to have to say it but I must find that Jones and Lowman are not fit and proper persons, within the meaning of the statute, to have custody of the child, for all of the reasons that the record makes quite clear. This finding has nothing to do with their moral character but refers to their economic and health conditions and their inability to fulfill normal parenting responsibilities." (Appendix, p.2,3)

Judge Jamison's opinion did not expressly address the constitutional issues raised by Mr. Jones.

Everett Jones, through counsel, sought review of the Circuit Court decision by the Supreme Court of Virginia by petition timely filed. That petition raised the issue of constitutionality of the lower court's application of the statute (See appendix, 52,65,66. The Virginia Supreme Court denied the petition for writ of appeal, summarily affirming the Circuit Court judgment on April 20, 1982 without explanation.

Material Facts.

Russell Knorr first came to Everett Jones and Blanche Lowman when he was a few days or weeks old, in 1974. Mr. Jones was approximately sixty years of age at the time. Blanche Lowman was thirty-one. Russell's mother, Mrs. Helen Knorr, signed sworn documents in 1977 and 1978 naming Everett Jones as the child's legal guardian and giving Mr. Jones permission to adopt the child.

Mrs. Knorr remained in contact with the family; she sat as an observer in the final hearing of this cause, but she was not a party and did not testify.

Little is known of Russell's natural father. The welfare department social worker, Patricia Aspinwall, related that one Russell Harding was the alleged father of the child. There is no information in the record about Mrs. Knorr's husband.

In 1978, Mr. Jones instituted an adoption petition seeking to make Russell his legal son. Following the statutorily required adoption investigation, the welfare department's report recommended against the adoption because of Mr. Jones' age. Mr. Jones withdrew his petition, however, and no further steps were taken at that time.

Russell Knorr remained with Mr. Jones and Ms. Lowman. He began attending church nursery school in 1977, when he was three years old. Mr. Jones and Ms. Lowman enrolled him in a summer Head Start program at the age of four, and Russell returned to Head Start the next summer, in 1979.

Mr. Jones and Ms. Lowman arranged for Russell's evaluation by the Rappahannock Area Child Development Center in early 1979, when Russell turned five. Russell was examined by Dr. Michael Fray and Dr. Raymond Jones in a series of visits beginning February 15, 1979.

On or about March 1, 1979, the welfare department conducted an investigation after receiving a report that Russell had fallen or jumped off the balcony of the Jones-Lowman apartment. The investigation showed that the accident happened while the adults in the apartment thought the child was napping. Although Mr. Jones and Ms. Lowman sought immediate medical attention for Russell, and although Russell was unhurt from his fall, a social worker from the welfare department, Patricia Aspinwall, began to monitor the family's care of Russell.

Ms. Aspinwall made four home visits in the Spring of 1979. The welfare department took no legal steps, and Ms. Aspinwall's visits were accepted by Russell's family.

The Child Development Center Report on Russell, which Mr. Jones and Ms. Lowman had requested, and which was completed sometime after April 6, 1979, made certain recommendations with respect to managing and caring for Russell. The evidence at trial was contradictory as to whether Everett and Blanche followed all of the recommendations, and also on whether the social worker, Patricia Aspinwall, offered any meaningful assistance in Everett's and Blanche's efforts to improve their skills in raising Russell. The welfare department continued to monitor the Jones-Lowman-Knorr family through 1979 and 1980, though it made few home contacts. Russell entered kindergarten in the fall of 1979, duly completing the school year. By the Spring of 1980, Russell was six years old.

In August of 1980, Everett Jones was seriously ill with a respiratory tract infection aggravated by asthma. Mr. Jones became very weak as a result of prolonged bed rest at Mary Washington Hospital, where he stayed for approximately six weeks. During the time Mr. Jones was in the hospital, Blanche Lowman suffered a recurring leg ulcer, requiring that she undergo skin-graft surgery in the hospital on or about September 15, 1980.

While Mr. Jones and Ms. Lowman were in the hospital, until September 26, 1980, Russell was cared for by Mrs. Ethel Grimes, a friend Blanche knew from Head Start. Before entering the hospital, Ms. Lowman had called the social worker, Ms. Aspinwall, for help in finding someone to care for Russell. Ms. Aspinwall urged that Russell be placed in foster care, a suggestion that Ms. Lowman rejected. Ms. Aspinwall also visited with Mr. Jones in the hospital at that time for over an hour and attempted to persuade him to voluntarily relinquish custody of the boy to the welfare department. Mr. Jones also refused.

On September 26, 1980, welfare department social worker Cheryl Matthew removed Russell from the Grimes home under the previously-mentioned emergency removal order. By court order, Russell was returned to the Grimes home, however, on September 29, 1980, the following Monday. After being reunited with Mr. Jones and Ms. Lowman upon their release from the hospital, Russell was removed from the Jones-Lowman home under a second juvenile court order on November 13, 1980. Mr. Jones appealed, as described above.

At the final Circuit Court hearing, the welfare department did not dispute that Mr. Jones and Ms. Lowman were Russell's psychological parents. Mr. Jones and Ms. Lowman had a combined income of $504.00 per month and paid rent of $59 per month at the Forest Village apartment complex. No other specific evidence as to the economic conditions of the family appears on the record. Both Mr. Jones and Ms. Lowman were in the home throughout the day, they fed and clothed Russell well, and their home was neat and clean.

Much of the evidence at the final hearing suggested that the child might have behavior problems with respect to aggressiveness and impulse control, although teachers and neighbors testified that he was a normal child. The memorandum opinion of John Jamison did not refer to evidence of Russell's behavior, however, and it is difficult or impossible to assess the Court's evaluation of the abundant evidence presented at trial as to the personalities and abilities of the child and the two psychological parents.

The evidence on the record with regard to the health conditions of Mr. Jones and Ms. Lowman shows that Mr. Jones was sixty-six years of age at the time of the final hearing. He had been disabled on account of a chronic asthmatic condition for approximately thirteen years. About 1978, when

sixty-one, he was successfully treated for a very confined prostate cancer. Although mild depression was noted, Dr. Donald Reed, his examining psychiatrist, found Mr. Jones to be "mentally capable and psychologically responsible to care for" a seven-year-old boy and capable of caring for a teenage boy. Mr. Jones's physician, Dr. Peter Smith, thought Everett Jones's general health was good, though he would always have asthma. While Mr. Jones was in the hospital for the respiratory tract infection previously discussed, he may have had a mild heart attack. Ms. Lowman had a history of phlebitis which periodically led to the appearance of ulcers on her legs that required surgery. She was disabled on that account. The examining psychiatrist found a mild manic disorder, but concluded that she, like Mr. Jones, was capable of being a parent to a seven-year-old boy.

REASONS TO NOTE PROBABLE JURISDICTION

This Case Presents An Important Constitutional Issue: What Limits Do The Due Process And Equal Protection Clauses Of The Constitution Place On The Power Of A State, Through Its Welfare Department, To Intrude Upon And Destroy A Familial Relationship?

The threshhold issue, for which there appears to be no precedent in this Court, is whether the relationship between Everett Jones and Russell Knorr was such as would entitle them to be considered members of a family when custody is at issue. If that question is answered in the affirmative, the remaining issue is whether the Commonwealth of Virginia denied Due Process of law or Equal Protection of the laws to Mr. Jones in finding him "unfit" because of his economic and health conditions.

A. As Russell's Psychological Parent Everett Jones is Entitled To The Protections Provided To Natural Parents When A State Seeks To Remove A Child From The Home.

One of the ironies of this case is the fact that the

Virginia juvenile courts statute appears to confer all the rights, duties and protections of the law on custodians and persons standing in loco parentis, with no distinction drawn between such persons and natural parents or legal guardians. The result in this case, however, suggests that the court discounted the significance of actual parenthood in favor of some sort of "title" or "privity" theory, the sort of theory one would expect to find in a property issue.

After the March 20 hearing on the merits, both parties submitted legal memoranda to the trial court. Mr. Jones's memorandum, citing Virginia case law and the state statutes governing juvenile and domestic relations matters, argued that the welfare department had no standing to challenge Mr. Jones's actual custody of Russell without at least an allegation of abuse, neglect, or some other perceptible harm. The section of the statute under which the welfare department had proceeded, 16.1-241.A.3, by statutory construction and case law, applied only to cases where two or more persons had an a priori legal claim to custody of a child. That is, it was meant to apply to custody disputes between estranged spouses and other similarly situated persons. Since the welfare department had no prior legal custody, it was argued, the welfare department had no legal basis to seek custody under 16.1-241.A.3 for the first time. In other words, the welfare department should have had to allege and prove abuse or neglect within the meaning of the statute before it could assert a claim for custody.

In a bizarre twist, the lower court's opinion failed to address the issue of whether or not the welfare department had legal standing; instead, the opinion held that Mr. Jones had no standing.[1] The opinion is devoid of explanation or legal reasoning on that point. Indeed, the opinion is contradictory

[1] The Court's opinion literally stated that Mr. Jones had no standing to adopt. Since adoption was never at issue, this was interpreted to mean that Mr. Jones had no standing with regard to custody.

(continued)

in that, after finding that Mr. Jones had no standing, Judge Jamison went on to rule that Mr. Jones and Ms. Lowman were also unfit. Neither finding is supportable on the record under the Constitution, given constitutional protections of the family as developed through opinions of this and other courts.

At issue was much more than the initial child custody question , though the disposition of that issue was the primary concern of all parties at the trial. At issue also were the rights of Mr. Jones even after the child was placed with the welfare department.

Judge Jamison's bald holding, "I cannot agree that Jones and Lowman have the necessary standing" was not simply the equivalent of a finding, for example, that a given party in a property dispute had no standing because he had no title, or because he lacked privity to a contract. The statutory family protection scheme in Virginia makes the determination of standing considerably more important than it would normally be in property disputes. Parents with legal standing, even the most abusive and neglectful parents, have rights under the statute that are not terminated with the kind of initial change of custody that the Circuit Court effected here by placing the child with the welfare department.

Under Section 16.1-279.A, Code of Virginia, a juvenile judge can only place the child with a welfare department after finding that there is no less drastic alternative. If Mr. Jones had no standing, he is not protected by the requirement for such a finding. Indeed, no such finding was made in this case.

Even more important than the provisions of 16.1-279 are the provisions of Sections 16.1-281, 16.1-282, and 16.1-283, which govern actions to be taken after a child is placed with

[1] Otherwise, the Court's ruling would mean that Mr. Jones had less standing than a total stranger seeking to adopt.

the welfare department. (See Appendix, p.20). These provide for a foster care plan to be prepared by the local agency, and that the preparers of such a plan "shall consult with the child's parents and other person or persons standing in loco parentis at the time the board or agency obtained custody concerning the matters which should be included in such plan." 16.1-281.A.

Section 16.1-281.B provides in pertinent part:

> "Such foster care plan in Part A thereof shall describe (i) the programs, care, services, and other support which will be offered to such child and his or her parents and other prior custodians, (ii) the participation and conduct which will be sought from the child's parents and other prior custodians, (iii) the visitation and other contacts which will be permitted between the child and his or her parents and other prior custodians, and (iv) the nature of the placement or placements which will be provided for such child. Such plan shall be designed to lead to the return of such child to his or her parents or other prior custodians within the shortest practicable time which shall be specified in the plan; provided, however, if the department or agency determines that it is not likely that the child can be returned to his or her prior family within a practicable time, consistent with the best interests of the child, in Part B of the plan such department or agency shall (i) include a full description of the reasons for this conclusion, (ii) determine the opportunities for placing the child with a relative if a subsequent transfer of custody to the relative is planned, or in an adoptive home within the shortest practicable time, and if neither of such placements is feasible (iv) explain why permanent foster care or continued foster care is the plan for the child. The department or agency may include with such proposed plan a proper pleading seeking the termination of residual parental rights pursuant to §16.1-283. (Emphasis supplied.)

Subpart C of Section 16.1-281 mandates that a copy of Parts A and B of the foster careplan be sent to the child's parents or any other person standing in loco parentis at the

time the board or agency obtained custody. Further "(a)ny party receiving a copy of the plan may petition the court for a review of the plan." 16.1-281.C. Upon such petition, the judge may hold a hearing to review and possibly modify the plan. Id.

Section 16.1-282, Foster care review, requires that the foster care plan be reviewed at least within sixteen months, and again, that it include consultation with the parents or other persons standing in loco parentis. A hearing to review the plan must be held, and the parent or other prior custodian given notice thereof. Id.

Finally, Section 16.1-283, Termination of parental rights, sets high standards for termination of parental rights. The grounds for termination include, though they are not limited to, a showing that parents are severely mentally ill, a showing that parents have failed to maintain contact with a child, or a showing that a parent has been unable or unwilling to remedy a condition which led to the original change of custody.

In considering the application of the Fourteenth Amendment to the Constitution of the United States to these Virginia statutes, and the facts of this case, one must conclude that it is a denial of Equal Protection of the laws to grant such thorough protections to the interests of natural parents and children but to deny them to Mr. Jones and Russell. This appellant was, and had been from Russell's infancy, the actual parent of the child, caring for Russell day in and day out.

In an analogous case, Stanley v. Illinois, 405 U.S. 645, 925 S.Ct. 1208, 31 L.Ed.2d 551 (1972), this Court decided that a natural but unwed father could not be presumed unfit to raise his children. Though never married to the mother of his children, the natural father was entitled to a hearing on his fitness as a requirement of Due Process, and could not be held to a different standard of fitness from a legitimate father as a matter of Equal Protection of the law. Here, on the basis of these same two

Fourteenth Amendment protections, the Court should not be allowed to exclude the psychological father from the courtroom.

It was undisputed that Everett Jones was the psychological parent of the boy. The importance of the psychological parent was presented to the court by expert testimony. Here, as in Stanley, the final ruling of the court denied the father standing with regard to the disposition of the child. Denial of standing to a psychological parent while awarding that status to biological parents is not only an irrational and inequitable distinction with respect to the nature of the relationships involved; it also ignores the "best interest" test commonly recognized as providing guidance in child custody matters. The distinction drawn by the Circuit Court between natural parents and actual parent completely ignored the best interest of the child by ignoring the significance and value of the emotional ties involved. Dr. Donald Reed, in a deposition presented at trial, indicated that the emotional ties between psychological parent and child are of the most serious importance to the personality development of the child. The same point was made and explained much more fully in two books introduced in this case, Before the Best Interest of the Child (J. Goldstein, A. Freud, A. Solnit, 1979 ed.) and Beyond the Best Interest of the Child, (J. Goldstein, A. Freud, A. Solnit, 1979 ed.)

It may well be that the Commonwealth of Virginia is under no constitutional mandate to provide such thoroughgoing protective measures as its juvenile courts law does provide. Having adopted such a law, however, the Commonwealth should be under a duty to apply the law similarly to similarly situated persons. That the Commonwealth failed to do in this case.

In addition to denying Equal Protection to the appellant, the statute as applied also denies him Due Process of law. A reasonable reading of the statutory language, i.e., "persons standing in loco parentis," "prior family", and "custodian" leads to the conclusion that it applies to Everett Jones in the circumstances of this case. If it does not,

the statute fails to give adequate notice of its meaning, and must be deemed so vague as to be repugnant to the Constitution. Indeed, if the statutory language does not confer standing upon Everett Jones under the circumstances of this case, the statute is a trap for the unwary.

B. It Was Improper For The Court To Remove The Child Because of Health And Economic Conditions Where There Was No Showing Of Abuse, Neglect, Abandonment, Or Any Other Significant Harm To The Child.

Because the trial court made a finding as to the appellant's fitness as a parent, (even though ruling that he had no legal standing in the proceeding), it is necessary to look at the nature of the trial court's findings with regard to fitness.

The statute in question contains rather explicit standards with regard to what might more broadly be termed "fitness." Nowhere does the statute use the word "fitness," however. Rather, the statute refers to children who have been "abused or neglected," including within that definition

> "any child whose parents or other person responsible for his care:
>
> 1. Creates or inflicts, threatens to create or inflict, or allows to be created or inflicted upon such child a physical or mental injury by other than accidental means, or creates a substantial risk of death, disfigurement or impairment of bodily or mental functions;
> 2. Neglects or refuses to provide care necessary for his health; provided however, that no child who in good faith is under treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination shall for that reason alone be considered to be an abused or neglected child;
> 3. Abandons such child; or
> 4. Commits or allows to be committed any sexual act upon a child in violation of the law." 16.1-228.A.

By omiting any reference to this specific statutory language and referencing instead the "economic and health conditio of Mr. Jones and Ms. Lowman, the trial court in this case either

ignored the clear language of the statute, or applied the terms of the statute with an interpretation so broad that it would allow intervention by state agencies into all manner of family child-rearing practices and conditions. Such unfettered liberty by the state to intrude into the home must be repugnant to constitutional principles governing family privacy and integrity.

It is interesting that the statute on its face focuses on precisely the sort of explicit endangering acts or omissions by parents that other courts have found to be the appropriate criteria for judging parental conduct in the sort of custody case that pits state agency against parent. In the leading case, Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10, aff'd, 545 F.2d 1137 (S.D. Iowa, 1975), (see appendix, p. 76) the court disapproved that part of a state statute which allowed permanent termination of parental rights where parents allegedly "refused to give the child necessary parental care and protection" and were "unfit (parents) by reason of . . . conduct deterimental to the physical or mental health or morals of the child." Id. 406 F.Supp. 10 at 15. Here, the statute, on its face, appears considerably more explicit than the offending language in Alsager and would seem to meet the Alsager standard for clear, understandable language that gives notice of what kinds of actions are forbidden. Unfortunately, the trial court applied the statute in such a way that, as in Alsager, the standards applied were too vague to give parents notice of what conduct the law would interdict.

Morever, as the Alsager court noted:

> "even in the context of a precise and specific enactment, Due Process requires a certain threshhold of harm to the child to justify termination . . .to sustain its compelling interest burden, the state must show that the consequences, in harm to the children, of allowing the parent-child relationship to continue are more severe than the consequencies of termination." (Id. at 406 F.Supp. 23)

Here, the lower court failed to weigh the harm inherent in placing Russell in foster care against any potential harm inherent in his living situation with Mr. Jones and Ms. Lowman. It requires only a little reflection to realize that economic and health conditions, standing alone, are an unreliable guide to the relative benefits to a child of one home placement versus another. Parents who are millionnaires may be neglectful or abusive in spite of the wealth at their disposal. By the same token, a family of subsistence means might provide for their children's needs in relative abundance.

The Jones-Lowman household cash income was low. Nevertheless, the rent was also extremely low. All witnesses agreed that the child had never lacked for food, clothing, games and toys, educational opportunities, religious training, or medical care. This Court may take judicial note of the fact that the maximum Virginia grant in aid to families with dependent children for a family of three is only $310.00 per month, or $194.00 less than the household income in this case. Should all the children whose families receive Aid to Families with Dependent Children be taken from their families?

One must suspect that a great many foster families are more economically insecure than the Jones-Lowman household. One of the grim realities of foster care is the fact that the small stipend paid to foster parents by the state for the care of each child is an important inducement, especially to economically marginal families, to participate in the foster care program. Further, as was shown on the record, the Commonwealth of Virginia has seen fit to offer a similar inducement for adoption of children as old as Russell because of the difficulty of placing older children. The lower court opinion failed to show any weighing of Russell's family's economic condition against the kind of economic conditions Russell might find in any future foster-family or adoptive family.

Similarly, the kinds of health conditions present in this case were not harmful to the child. Mr. Jones was of advanced age, but so are a great many custodial grandparents. Both Mr. Jones and Ms. Lowman were disabled, but both were also present in the home and able to care for the child. The proof of their abilities lay in the fact that they had cared for the child for over six years. This is not a situation in which some family member had tuberculosis or some other communicable disease.

If economic and health conditions could ever provide the basis for removal of a child from his home, considerations of Due Process require that those conditions be linked to some imminent and substantial harm to the child. Otherwise, another of the concerns discussed in Alsager is raised. That is, a law that allows a child to be removed on the basis of such conditions where there is no clear harm or danger of harm fails to afford Due Process as a substantive matter. Vague concerns by social worker or judge about what may happen or could happen in the future, cannot outweigh the very real, though intangible, psychological injury that is brought upon a child who is wrenched from the only parents he has ever known.

It has long been recognized that there is a constitutionally protected interest in preserving the family unit and raising one's children. The constitutional right of family integrity can only be overridden by a state interest that reaches a significant magnitude. Clearly, the state has an overriding interest in protecting infants and children from abuse and neglect. The state has an equally compelling interest in sheltering homeless children, and in supervising delinquent and ungovernable children. The state does not have a sufficiently important interest in removing children from their homes on the basis of a social worker's vague disapproval of child rearing practices. Given the uncertainties of the child's life after

removal, the welfare department has the burden of showing that the child will clearly be better off in the custody of the state. Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10, at 21, 22.

In reaching its conclusion, the Alsager court first found that a long line of cases from this Supreme Court supported the contention that family privacy and integrity are rights so fundamental that any state action to infringe those rights must be motivated by a compelling state interest, and that such state action is subject to strict scrutiny with respect to how it furthers that compelling state interest. The Alsager Court's position in that respect has recently been ratified by this Court in the case of Santosky v. Kramer, _____ U.S. _____, 50 L.W. 4333 (1982). The Santosky opinion referred to "this Court's historical recognition that freedom of personal choice in matter of family life is a fundamental liberty interest protected by the Fourteenth Amendment." 50 L.W. 4333 at 5335.

Justice Blackmun's opinion in Santosky v. Kramer points out the magnified risk of erroneous factfinding in parental termination cases, emphasizing the power of the state that is brought to bear against a parent who is often poor and uneducated. Id. at 4337. As the opinion states, "because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination." Id.

In line with Santosky v. Kramer, appellant would show that the clear and convincing standard constitutionally required for permanent termination of parental rights must also be the standard for placing the child in the custody of the state in the first instance. This is especially so where, as here, the state statute allows for permanent termination if the parents cannot show correction of the circumstances orginally leading to the child's being placed with the welfare agency in the first place. Section 16.1-283.C.2, Code of Virginia of 1950, as amended. To

allow a lower standard at the first custody determination would effectively negate the clear and convincing standard at the later hearing. In other words, it would be too easy for the state agency to show by clear and convincing evidence that the original conditions had not changed, even if the original conditions themselves did not constitute grounds to terminate parental rights, and even if the original conditions were established only by a preponderance of the evidence.

In line with Alsager v. District Court of Polk County, Iowa, there is a final grievous constitutional error with the result in this case. The welfare department petitioned on grounds that the child Russell Knorr's custody was "in need of determination." That petition was fatally defective because it failed to give any notice to Everett Jones as to the grounds upon which the welfare department was seeking custody. In effect it cast upon Mr. Jones the burden of having to negate every possible charge that his parenting was inadequate. The record shows that Mr. Jones proceeded to attempt precisely that. His witnesses included neighbors, a relative, teachers, psychologists, a psychiatrist, and a medical doctor. The problem with proceeding against such a nebulous charge is illustrated perfectly by the result in this case. After all the witnesses, Judge Jamison found no moral unfitness, never mentioned abuse or neglect, and, indeed, mentioned the love and care given to Russell by Everett Jones and Blanche Lowman. Nevertheless, the judge found unfitness on the basis of the economic and health conditions of Mr. Jones and Ms. Lowman.

One thing that Jones had not gone into in any depth at the trial was the family's economic situation and how they planned to continue to meet Russell's needs. It is impossible to know from the record, for example whether or not the family had health insurance for Russell.

Had the petition alleged that the family's economic and health circumstances were grounds for removal, (leaving aside the issue of whether such circumstances could ever be grounds for removal), at least Mr. Jones would have been able to speak to such concerns. Where such fundamental interests as family integrity are at stake, it is a denial of Due Process as a procedural matter to fail to allege sufficient facts for the defendant in such a case to prepare a defense. (Alsager v. District Court of Polk County, Iowa, 406 F.Supp. 10.

CONCLUSION

The order of the Circuit Court should be reveresed and the child should be returned to the custody of Everett Jones. The Circuit Court's actions, as ratified by the Virginia Supreme Court, violated United States constitutional standards for all the reasons presented here.

Respectfully submitted,

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